

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSALINDA DEL TORO

Claimant

VS.

ST. CATHERINE HOSPITAL

Respondent

AND

**INDEMNITY INSURANCE CO. OF
NORTH AMERICA**

Insurance Carrier

Docket No. 1,037,628

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 4, 2008, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. Beth Regier Foerster, of Topeka, Kansas, appeared for claimant. Christopher D. Werner, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for temporary total disability compensation from June 25, 2008, through September 2, 2008, a period of time that claimant had been released to work with restrictions. The ALJ found that but for claimant's termination for cause from respondent, her restrictions would have been accommodated.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 3, 2008, Preliminary Hearing and the exhibits; the transcript of the May 5, 2008, Preliminary Hearing and Motion and the exhibits; the transcript of the deposition of Mary Anne Cook taken October 1, 2008; the transcript of the deposition of Amber Wittington taken October 1, 2008; the transcript of the deposition of Alonna Mantzke taken October 1, 2008 and the exhibits; and the transcript of the

deposition of Kathy Morrison taken October 1, 2008, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests the Board reverse the order of the ALJ and find that she is entitled to temporary total disability compensation. Claimant asserts that the ALJ exceeded her jurisdiction in finding that claimant was terminated for cause and that the ALJ used incorrect standards of law in determining when a termination is for cause as a matter of law.

Respondent contends the Board does not have jurisdiction of this issue. In the event the Board finds it does have jurisdiction, respondent argues that claimant was terminated for cause and that but for that termination, she would have been afforded accommodated work at the same rate of pay and hours she received before her injury. Accordingly, respondent asserts the ALJ correctly found that claimant was not eligible for temporary total disability compensation after she was released to return to work with restrictions.

The issue for the Board's review is:

- (1) Does the Board have jurisdiction over the issues in this appeal?
- (2) If so, did respondent have just cause to terminate claimant's employment?
- (3) Is claimant eligible for temporary total disability compensation?

SUMMARY OF EVIDENCE

Claimant began working for respondent in 2005 as a licensed practical nurse (LPN). Amber Whittington, respondent's clinic nurse manager and claimant's supervisor, testified that claimant had repeatedly been counseled on organizational skills and absenteeism and also that claimant had been routinely late to work. On October 2, 2007, claimant had a verbal confrontation with a coworker, Mary Anne Cook. Claimant angrily accused Ms. Cook of violating HIPPA and said she would have Ms. Cook disciplined. Ms. Cook reported the incident to Ms. Whittington. Claimant was terminated the next day, October 3, 2007. Ms. Whittington testified that claimant was terminated for misconduct. Respondent has a progressive disciplinary process, and although the confrontation with Ms. Cook was the final incident, the reason for her termination, according to Ms. Whittington, was an accumulation of poor performance, poor attendance, and the incident with Ms. Cook.

The next day, claimant filed a workers compensation claim requesting treatment for bilateral carpal tunnel syndrome. After a preliminary hearing held May 5, 2008, the ALJ

ordered respondent to provide claimant with medical treatment. Dr. Alexander Neel was named claimant's authorized treating physician. He performed carpal tunnel release on claimant's right arm on June 13, 2008, and claimant was off work until June 24, 2008. Respondent paid temporary total disability compensation during that period of time. After that date, Dr. Neel placed restrictions on claimant of no lifting, pushing, or pulling over two pounds with her right arm.

On July 31, 2008, Dr. Neel performed carpal tunnel release on claimant's left arm. Claimant was again taken off work completely for about 10 days, and again respondent paid temporary total disability compensation for that period of time. Claimant was released fully to return to work on September 2, 2008.

Alonna Mantzke, respondent's workers compensation coordinator, testified that although respondent's Medical Administration Control Program protocol indicates that light duty work is not guaranteed to injured workers with restrictions, in her nine years with respondent it has always provided accommodated work for injured workers with medical restrictions. And although claimant had significant restrictions after her carpal tunnel surgeries, Ms. Mantzke testified that claimant would have been provided an accommodated position as an interpreter in which she would not have had to use her hands but would only provide verbal interpreter duties. Her wage and hours worked would have remained the same. Ms. Mantzke stated that claimant was not offered accommodated work because she had been terminated before being placed under her medical restrictions.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2008 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including

testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Quandt*,¹ the Kansas Court of Appeals stated:

K.S.A. 44-534a(a)(1) permits an employer or employee to seek a preliminary hearing regarding medical treatment and the payment of temporary total disability compensation before the issuance of a final award. K.S.A. 2006 Supp. 44-551(i)(1) permits appeals to the Workers Compensation Board (Board) of preliminary awards under K.S.A. 44-534a. However, K.S.A. 44-534a(a)(2) only provides for Board review of what it describes as jurisdictional issues, such as whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or the claim is timely made, or whether certain defenses apply. No other preliminary findings or preliminary awards are appealable, and these other preliminary findings and awards are not binding in a full hearing on the claim, but are subject to a full presentation of the facts.

In *Allen*,² the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹ *Quandt v. IBP*, 38 Kan. App. 2d 874, Syl. ¶ 1, 173 P.3d 1149 (2008).

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

³ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁴ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁵

ANALYSIS

As the ALJ stated in her Order, claimant was no longer employed by respondent when claimant filed her workers compensation claim. Despite the ALJ's statement or findings that respondent could have accommodated claimant's restrictions, whether respondent would have accommodated claimant absent her prior termination is speculative and probably irrelevant.

An ALJ has the jurisdiction and authority to grant or deny temporary total disability compensation at a preliminary hearing. The ALJ did not exceed her jurisdiction by denying claimant temporary total disability benefits. Whether claimant is entitled to temporary total disability compensation under the facts of this case or whether the circumstances of claimant's termination preclude an award of temporary total disability compensation is not a certain defense under K.S.A. 44-534a because it does not go to the question of the compensability of the entire claim.

CONCLUSION

Whether claimant is temporarily and totally disabled and whether to award a claimant temporary total disability compensation for a particular time period are not issues the Board has jurisdiction to decide on an appeal from a preliminary hearing.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that claimant's appeal of the Order of Administrative Law Judge Pamela J. Fuller dated November 4, 2008, is dismissed.

IT IS SO ORDERED.

⁵ K.S.A. 2008 Supp. 44-555c(k).

Dated this _____ day of February, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Christopher D. Werner, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge